



April 20, 2001

Mr. Juan E. Gonzalez
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OR2001-1578

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 146271.

The City of Mercedes (the "city"), which you represent, received a request for "the Letter of no confidence against Police Chief Jose Flores." You claim that the requested information is excepted from disclosure under sections 552.102 and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

As section 552.108 of the Government Code is the more inclusive exception you raise, we address it first. Section 552.108, the "law enforcement exception," provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution [.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You contend only that, should certain information relating to polygraph and intoxilizer tests be released, "the City is concerned that it could affect the prosecutions [sic] ability to convict recipients of intoxilizer [sic] tests and that defense attorneys could use the memo to discredit the testimony of Mercedes Police Department officers at trial." You do not demonstrate that the release of the requested information would interfere with any pending criminal investigation or prosecution. See Gov't Code § 552.108(a)(1); see also *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). You also make no showing that the requested information represents an internal record or notation, the release of which would interfere with law enforcement or crime prevention. See Gov't Code § 552.108(b)(1); see also Open Records Decision Nos. 636 (1995), 531 (1989). We therefore conclude that the city may not withhold the requested information under section 552.108. See also *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (stating that statutory predecessor to section 552.108 is not applicable where no criminal investigation or prosecution of police officer resulted from internal affairs investigation); Open Records Decision No. 350 (1982) (stating that statutory predecessor is not applicable to internal affairs investigation file when no criminal charge against police officer results from investigation).

You also raise section 552.102 of the Government Code, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The test for determining whether information is excepted from disclosure under section 552.102 corresponds to the test under section 552.101 in conjunction with the common law right to privacy.¹ Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). But privacy under section 552.102 is considerably narrower, because of the greater legitimate public interest in matters involving public employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(1986), 423 at 2 (1984). Generally, privacy under section 552.102 protects information from disclosure only when that information reveals “intimate details of a highly personal nature.” *See* Open Records Decision No. 423 at 2 (1984).

You contend that the requested information “makes several allegations against individuals which cannot be substantiated by the City without further investigation. Some of these allegations include claim [sic] of illegal acts, favoritism and incompetency.” Having considered your arguments, we conclude that none of the information at issue is excepted from disclosure under section 552.102. *See* Open Records Decision Nos. 405 at 2 (1983) (stating that information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest), 423 at 2 (1984) (stating that information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 444 at 3-4 (1986) (stating that public has obvious interest in having access to information concerning the qualifications and performance of governmental employees, particularly those involved in law enforcement).

We note, however, that the submitted documents include information that is protected by section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, as well as information that reveals whether a peace officer has family members, *regardless of whether the peace officer complies with section 552.024 of the Government Code*. The city must withhold all such information pertaining to peace officers under section 552.117(2).

In summary, the requested information is not excepted from disclosure under either section 552.108 or section 552.102 of the Government Code. Personal information relating to peace officers must be withheld from disclosure under section 552.117(2). With the exception of that information, the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

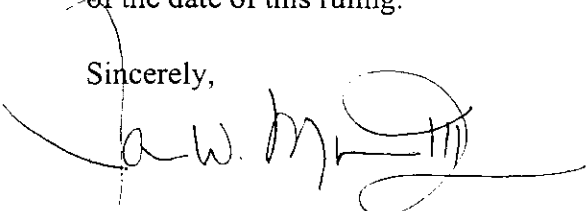
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/rr

Ref: ID# 146271

Encl: Submitted documents

cc: Mr. Travis M. Whitehead
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(w/o enclosures)